

Supreme Court's Advisory Committee on the Rules of Criminal Procedure

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

*The meeting is scheduled
in Council room

September 15, 2015
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and approval of minutes - Patrick Corum
2. Introduce new members - Patrick Corum
3. Rules published for public comment - Patrick Corum
4. Rule 14 - subpoenas - Patrick Corum
5. Rule 7(h)(2) - Douglas Thompson
6. HB 308 update - Jeffrey Gray
7. Rule 7 rewrite update - Judge Brendan McCullagh
8. Rule 22 - rewrite - Judge Brendan McCullagh
9. Rule 18, peremptory challenges - Brent Johnson
10. Rules 11 and 22 - DV warning - Brent Johnson
11. Other business
12. Adjourn

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Rule 17.5. Hearings with contemporaneous transmission from a different location.

(a) The court, in its discretion, may conduct the arraignment, bail hearing, and/or initial appearance with a defendant attending by contemporaneous transmission from a different location without the agreement of the parties or waiver of the defendant's attendance in person.

(b) For any other type of hearing, the court may only conduct the hearing with a defendant attending by contemporaneous transmission from a different location if the parties agree and the defendant knowingly and voluntarily waives attendance in person.

(c) The court, in its discretion, may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives confrontation of the witness in person.

Utah State Courts Rules - Published for Comment

Comments: Remote Hearings Rules

Regarding proposed URCrP 17.5, subsection (a) appears to be aimed at allowing video hearings for in-custody defendants under these circumstances. Please consider amending the "different location" language to read "jail or correctional facility." This clarification narrows the subsection's applicability to in-custody defendants. The danger with the broader "different location" language is allowing out-of-custody defendants to be excused from an initial appearance when they should otherwise appear in person (at that point any waiver of future appearances can be addressed once counsel is appointed or retained). Otherwise allowing out-of-custody defendants to appear remotely for an initial appearance confers preferential treatment on those individuals with the financial means to post bail and absent themselves from the judicial process.

Posted by Ryan Stack July 10, 2015 10:50 AM

Regarding URCP 60(c), it is unclear what date has priority; the date of the entry of the written order or the date of the proceeding. Previously we could rely on the language as to when the order was entered, but that has been removed. Perhaps stating "not more than 90 days after the entry of the judgment... or if no order is signed the date of the proceeding.

Posted by Russell Yaune June 30, 2015 04:41 PM

A growing number of criminal defense expert witnesses and parents' experts in juvenile child welfare cases are pressuring the parties and the Court to allow them to testify by Skype or other method from the comfort of their home or office. Having watched a few trials in juvenile court where the State's experts all testified in person and the parents' experts all testified by Skype, it is clear that there is a denial of the due process right to full cross-examination of an expert witness when the expert is not present in court. In those trials, parents' counsel freely cross-examined the State's experts with learned treatises, computer graphics and other materials, while the State's attorney could not engage in the same type of cross-examination because of the limitations of the technology.

It is anticipated that the same group of regular defense experts will begin to make the same requests in criminal cases involving child abuse allegations, and the inherent unfairness of that process should result in a rule that prohibits experts from testifying from a remote location. Given the fact that a huge cottage industry has been created among experts with questionable qualifications and with little or no scientific basis underlying their opinions, both parties should have an equal ability to fully cross-examine all experts in child abuse trials and preliminary hearings.

Posted by Robert Parrish June 26, 2015 09:48 AM

Rule 7

Current Language

(e) The magistrate having jurisdiction over the offense charged shall, upon the defendant's first appearance, inform the defendant:

(e)(1) of the charge in the information or indictment and furnish a copy;

(e)(2) of any affidavit or recorded testimony given in support of the information and how to obtain them;

(e)(3) of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;

(e)(4) of rights concerning pretrial release, including bail; and

(e)(5) that the defendant is not required to make any statement, and that the statements the defendant does make may be used against the defendant in a court of law.

...

(h)(2) If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than ten days if the defendant is in custody for the offense charged and not later than 30 days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. A preliminary examination may not be held if the defendant is indicted.

Proposed Changes

(e) The magistrate having jurisdiction over the offense charged shall **hold a first appearance within _____ days of defendant's arrest**, and shall ~~upon the defendant's first appearance, inform the defendant:~~

(e)(1) **inform the defendant** of the charges in the information or indictment and furnish a copy;

(e)(2) **inform the defendant** of any affidavit or recorded testimony given in support of the information and how to obtain them;

(e)(3) of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;

(e)(4) inquire into whether the defendant requests to have the court consider the appointment of counsel;

(e)(5) inform the defendant of rights concerning pretrial release, including bail; **and**

(e)(6) inform the defendant that the defendant is not required to make any statement, and that the statements the defendant does make may be used against the defendant in a court of law; **and**

(e)(7) inform the defendant of the right to demand and receive a preliminary hearing to determine whether probable cause exists to believe that the offenses charged were committed by the defendant.

...

(h)(2) If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than ~~ten~~ **14 days from the date of request** if the defendant is in custody for the offense charged and not later than ~~30~~ **28 days from the date of request** if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. A preliminary examination may not be held if the defendant is indicted.

Rule 22. Sentence, judgment and commitment.

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c)(1) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that if the current case meets the criteria of 18 U.S.C. § 921(a)(33), then pursuant to federal law it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) At any time after sentencing, the court may correct a sentence when the sentence imposed:

(1) Exceeds the statutorily-authorized maximums;

(2) is less than statutorily-required minimums;

(3) violates Double Jeopardy; or

(4) is ambiguous or internally contradictory.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) If the defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that, if the case meets the criteria of 18 U.S.C. § 921(a)(33) then pursuant to federal law, ~~as a result of the plea,~~ it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(h)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved or rejected by the court.

(h)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(i)(1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(i)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(i)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(j) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(k) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(l) Compliance with this rule shall be determined by examining the record as a whole. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded. Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea.